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IN THE

Supreme Court of the United States

October Term, 1969

No. 914

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

against

RICHARD JOYCE SMITH, as Trustee of the Property of the New York, New Haven and Hartford Railroad Company, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT

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December 5, 1969

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Petitioner, The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (Bondholders Committee), respectfully prays that a writ of certiorari be issued to the United States Court of

Appeals for the Second Circuit to review, before judgment is issued in that Court, so much of this case pending in that Court as relates to "Step I" issues* which are dealt with in the orders of the United States District Court for the District of Connecticut (Reorganization Court), dated August 10, 1968 and July 1, 1969, and in Part I of the order dated July 28, 1969.

Part I of the order dated July 28, 1969 adjudged the price that the Penn Central Company (Penn Central) is required to pay to the New Haven for the assets of the New Haven transferred to Penn Central on December 31, 1968, in addition to the price established by the Interstate Commerce Commission (Commission) in its Fourth Supplemental Report dated November 25, 1968 (Remand Report).

The sale of the New Haven's assets to Penn Central is one of the consequences of the approval of the merger of Penn and Central. See *Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486 (1968). Proceedings essentially parallel and related to the "Step I" issues have taken place before a three-judge United States District Court for the Southern District of New York (Statutory District Court).

The Bondholders Committee has appealed from the decree of the Statutory District Court and is contemporane-

* By order dated October 7, 1969, the United States Court of Appeals for the Second Circuit consolidated various appeals into two separately consolidated appeals; one relating to "Step I" issues (i.e. issues relating to the sale of The New York, New Haven & Hartford R.R. Co. (New Haven) assets to Penn Central Company, the valuation thereof, and the price to be paid therefor) and the other relating to the "Step II" issues (i.e. issues relating to that portion of the plan of reorganization which involves the internal reorganization of the New Haven including the rights of creditors *inter se*).

ously filing in this Court a jurisdictional statement pursuant to Rule 15 of the rules of this Court in respect of such appeal. Much of the material set forth in the jurisdictional statement is pertinent to this petition for a writ of certiorari and, in order to avoid the unnecessary repetition of information and argument, we refer herein to various portions of the jurisdictional statement and incorporate such portions in this petition by reference. We respectfully request this Court to consider the material so referred to as if it were included in this petition.

Opinions Below

The Reorganization Court issued its opinion in this case on May 28, 1969. The opinion is not yet reported and has been reprinted at pages 277a-306a to the Joint Appendix* filed herewith. A supplementary opinion dated July 28, 1969 has been reprinted at pages 312a-315a and the orders dated May 28, July 1 and July 28, 1969 have been reprinted commencing at page 307a, page 309a and page 312a.

The related proceedings in the Statutory District Court were the subject of unreported opinions dated June 18, 1969 and September 11, 1969. The opinions are reprinted at pages 400a-443a and 444a-445a to the Joint Appendix.

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* The Joint Appendix is entitled "New Haven Railroad Terms of Sale and Inclusion Cases" and is being filed in connection with the filing of this and companion petitions and the filing of jurisdictional statements in respect of appeals from the decree of the Statutory District Court. Reference to pages of the various opinions, orders and decrees reprinted in the Joint Appendix will be identified by reference to "Jt. App. p. ——".

The earlier opinions in this case and related proceedings and the citations thereto are set forth in the "Opinions Below" section of the jurisdictional statement (pages 3-5) filed by the Bondholders Committee. That section is incorporated herein and the Court is respectfully referred thereto.

Jurisdiction

The judgment of the Reorganization Court sought to be reviewed is the final order under Section 77 of the Bankruptcy Act concerning the price to be paid by Penn Central for the New Naven assets. The order was dated and entered on July 28, 1969.

The Bondholders Committee filed a Notice of Appeal to the Court of Appeals for the Second Circuit on August 26, 1969.

The Record on Appeal was timely docketed in the Court of Appeals for the Second Circuit on December 2, 1969.* No briefs have been filed in the Court of Appeals and the case has not been heard or decided by that Court.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and Rule 20 of the Rules of this Court.

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* The Circuit Court of Appeals extended the time of the parties to docket the appeal until December 15, 1969.

Questions Presented

Since the Statutory District Court and the Reorganization Court are in agreement with each other that the Constitution of the United States, Section 5(2) of the Interstate Commerce Act and Section 77 of the Bankruptcy Act require a minimum purchase price and since both courts have determined that the price found by each *is* the minimum purchase price permitted by the Constitution and the statutes, any error by either of the courts which results in the failure to give the minimum value results in the fixing of an unlawful price. The Commission has ordered the transfer of the New Haven assets on the basis of a purchase price which it considers to be the lowest price permissible under the Constitution of the United States, which price it considers to be identical to the lowest price permissible under Section 5(2) of the Interstate Commerce Act and Section 77 of the Bankruptcy Act. As a result, virtually all the questions involved in this appeal are questions which test the boundaries of the Constitution, the boundaries of two important statutes and the boundaries of the Commission's power.

1. Where the Reorganization Court and the Commission in the name of the public interest have required, for seven and one-half years, the erosion of over $60 million of the bondholders' security with the knowledge that the New Haven could not be reorganized as an operating railroad because its income could not equal its operating expenses, does liquidation value without compensation for the erosion work an unconstitutional taking of the bondholders' property?

2. Have Penn and Central, by their merger with knowledge that a condition of such merger requires payment of a

price fair and equitable to the New Haven, perforce accepted to pay an amount equal to liquidation value plus the New Haven's losses resulting from the Commission's and the Reorganization Court's requirement that operations of the New Haven continue until those operations are assumed by Penn Central?

3. Has the Commission violated the Fifth Amendment to to the Constitution of the United States, or Section 77 of the Bankruptcy Act in requiring the transfer of the New Haven assets to Penn Central for a price less than the fair market price that could be achieved upon liquidation sales?

4. Has the Reorganization Court erred in concluding that payment of a substantial portion ($83.1 million) of the minimum price required by the Constitution is satisfied by the delivery of shares of Penn Central common stock having a market value of $60.21 million on the date of the transfer of the assets and a value of $50.35 million of even date with the valuation of the assets, if supplemented by an undertaking by Penn Central to pay on February 1, 1978 the difference between $83.1 million and the then market value of the shares?

5. Has the Reorganization Court erred in failing to hold that the Commission violated Section 77 of the Bankruptcy Act in requiring the transfer of the New Haven's right to receive $5.6 million annually from the Grand Central Terminal real estate and hotels, without any compensation to the New Haven for such transfer?

6. Has the Reorganization Court erred in failing to hold that the Commission violated the Fifth Amendment to the Constitution of the United States or Section 77 of

the Bankruptcy Act in requiring the transfer to Penn Central of certain securities owned by the New Haven, without any compensation to the New Haven for such transfer?

7. Has the Reorganization Court erred in sustaining the Commission's imposition of operating losses upon the New Haven between the time of the Penn Central merger and the transfer of the New Haven assets to Penn Central while the Reorganization Court and the Commission required the New Haven to continue uninterrupted service?

8. Where the Commission and the Reorganization Court have required the continuation of deficit operations without interruption and imposed upon Penn Central, as merger applicants, the requirement that the applicants, after merger, shall operate the service of the New Haven and pay a fair and equitable price for the assets, is a price fixed without assignment of value to the intangible going concern assets which permit Penn Central to continue the service without interruption, fair and equitable?

9. Has the Reorganization Court erred in accepting valuations arrived at by the Commission in violation of the rights of the bondholders to due process where the Commission improperly tailored its findings and conclusions to suit its design for the national transportation policy and subordinated to that design its obligation to adjudicate the evidence impartially?

Constitutional Provisions and Statutes Involved

The provisions of the United States Constitution and of the United States Statutes, which are believed to be involved in this case have been set forth in the jurisdictional statement filed by the Bondholders Committee in the section entitled "Statutes Involved" (page 6) and that section is respectfully incorporated herein. The text of the statutes is reprinted in full in the Joint Appendix, supplemented by the Appendix to the jurisdictional statement.

Statement of the Case

The statement of the case containing the facts material to the consideration of the questions presented has been set forth in the jurisdictional statement filed by the Bondholders Committee in the section entitled "Statement" (pages 10-23) and that section is respectfully incorporated herein.

REASONS FOR GRANTING THE WRIT

I

Review of this case before judgment in the Court of Appeals is required to permit expeditious and comprehensive review of matters of public importance as to which there is a substantial conflict between a Statutory District Court and a Reorganization Court in parallel review proceedings.

The Bondholders Committee requests this Court to grant a writ of certiorari to review the decision and order of the Reorganization Court before judgment in the Court of Appeals because the reports and orders of the Commission have been subjected to contemporaneous review by the Reorganization Court and a Statutory District Court which have differed greatly in their decisions.

The reports and orders of the administrative agency came to be reviewed in two district courts at about the same time because, by the terms of the reports and orders themselves, the requirement was laid down that the terms fixed by the Commission were subject to the approval of the Reorganization Court under Section 77 of the Bankruptcy Act while the jurisdiction of the Statutory District Court was invoked under Section 5(2) of the Interstate Commerce Act. The Statutory District Court applied the standards of Section 5(2) of the Interstate Commerce Act. Until this Court determines whether the Commission orders satisfy the requirements of Section 77 of the Bankruptcy Act and condition 8 to the Penn Central merger and resolves the differences in the orders of the two courts, the proceedings cannot be advanced, the reorganization cannot

proceed and the plan of reorganization cannot be implemented. The thousands of New Haven bondholders cannot know their rights. The state and local taxing authorities who are administration creditors by virtue of the non-payment of real estate taxes cannot be provided for. Penn Central security holders cannot know with any certainty the impact, if any, the final determination will have upon their investments. Penn Central's management cannot know the impact this Court's decision may have and what financial steps it may appropriately take.

The appeal from the Statutory District Court is by statute directly to this Court. If this Court grants the writ prayed for herein, the New Haven reorganization proceedings, which have now been pending for seven and one-half years, can be concluded with dispatch. Although the jurisdiction of the two district courts were invoked under different statutes, and the courts applied the statutes differently, the courts' decrees were applied to the same facts. The prospect of separate arguments with respect to the same facts on separate occasions before this Court will be avoided. In the public interest and in the interest of orderly and speedy judicial administration the writ should be granted.

The Bondholders Committee submits that this case falls within the scope of Rule 20 of the rules of this Court and is of such public importance as to justify the deviation from normal appellate processes which is sought herein.

II

The Reorganization Court has erred in significant respects which have the effect of depriving the New Haven of its property. Important questions involving the constitutional limits of Section 77 of the Bankruptcy Act are presented.

Since the errors of the Reorganization Court advanced by the Bondholders Committee were also committed by the Statutory District Court, they have been discussed in the jurisdictional statement filed by the Bondholders Committee to show to this Court that the questions involved are substantial. The substantial nature of the questions involved present, we believe, sufficient reasons for the granting of the writ by this Court. In order to avoid repetition, we respectfully refer the Court to points I, II, III, VII and VIII of the section of the jurisdictional statement entitled "The Questions Presented Are Substantial" and request that the material set forth therein be considered by this Court as if set forth herein to show the reasons why the writ should be granted to review the final orders of the Reorganization Court.

CONCLUSION

For the reasons above stated and stated in the jurisdictional statement filed in this Court in respect of the appeal of the Bondholders Committee from the decree of the Statutory District Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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